Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978.

No. A-355 (78-649)

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, and JOHN WEIS,

APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDELL, and WILLIAM M. YATES,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS

HAROLD HESTNES
JOHN G. FABIANO
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
Tel: (617) 742-9100

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MOTION TO DISMISS

Pursuant to Rule 16(1)(b), appellees move this Honorable Court to dismiss the appeal herein on the ground that it presents no substantial federal question warranting review by this Court.

I. The State Law Involved and the Nature of the Case

A. *The State Law*

Appellants erroneously contend that the court below interpreted a state statute, Mass. Gen. Laws Ann. ch. 55, so as to impose "a flat ban on municipal speech" (Jurisdictional Statement 2). In fact, the Massachusetts Supreme Judicial Court determined that, as a matter of state law, a municipal ordinance and appropriation adopted by the appellants exceeded municipal powers under the "home rule" provisions of the Massachusetts Constitution. The pertinent state constitutional provision provides:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. Mass. Const. Amend. Art. 2, §6.

B. *Prior Proceedings*

The appellees, eleven taxable inhabitants of the City of Boston (J.S. 1a, 26a), commenced this action pursuant to a Massachusetts statute, Mass. Gen. Laws Ann. ch. 40, §53, which permits ten or more taxable inhabitants to challenge illegal municipal appropriations. The appellees sought to restrain the appellants from spending public funds and using public employees and other public resources to urge approval by Massachusetts voters of a referendum proposal to amend the Massachusetts Constitution. The proposed

amendment would permit the Massachusetts legislature to classify real property according to its use in no more than four classes for the purpose of taxing such property differently by class (J.S. 27a).

The appellants support the proposed amendment and urge passage of the referendum question (hereinafter "the Classification Referendum question") (J.S. 27a). On June 7, 1978, a five-four majority of the City Council passed and Mayor White approved an ordinance and appropriation authorizing the expenditure of $975,000 in public funds to urge voter approval of the Classification Referendum question (J.S. 2a, 3a, 27a-29a).

On June 23, 1978 the appellees commenced this action in the Massachusetts Supreme Judicial Court to enjoin the expenditure of the $975,000 appropriation. After hearings before a single justice, the case was reserved and reported to the full Supreme Judicial Court on the pleadings and an Agreed Statement of Facts (J.S. 2a). Both parties submitted briefs, and the case was argued to the full court on July 13, 1978 (J.S. 5a). On July 19, 1978, the Supreme Judicial Court entered a brief order enjoining the appellants from expending the appropriated funds and indicating that an opinion would follow (J.S. 38a). On August 23, 1978, the Supreme Judicial Court denied the appellants' motions for a stay of the order and for a rehearing and issued its unanimous opinion (J.S. 1a, 44a). Final judgment was entered in the court below on October 4, 1978 (J.S. 25a).

On October 17, 1978, appellants filed a Notice of Appeal below (J.S. 45a) and an Application for Stay in this Court. On October 20, 1978, Mr. Justice Brennan, as Circuit Justice, granted the requested stay. On November 6, 1978, this Court denied appellees' motion to vacate stay. Mr. Justice Stevens, with whom Mr. Justice Stewart and Mr. Justice Rehnquist joined, dissented.

II. Argument

A. The City of Boston Has No First Amendment Right of Free Speech.

The central premise of appellants' argument is that municipalities have a First Amendment right of free speech. No decision—in this Court or elsewhere—has recognized such a constitutional right. As the court below noted, the highest courts of California, Illinois, Arizona and New Jersey have held:

> without discussion of . . . freedom of speech, that a municipality or a similar political subdivision may not expend public funds for the purpose of influencing the result on an election question. (J.S. 12a n.12).

Prior to the opinion below, the only reported decision which squarely addressed the issue of an asserted "governmental right of free speech" flatly rejected the existence of such a right:

> [T]he issue raised by the instant application is not one concerning freedom of speech or association, but whether it is a proper function of a state agency to actively support a proposed amendment to the state constitution which is about to be presented to the electorate in a statewide referendum. *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 449-50, 375 N.Y.S.2d 235, 237 (Sup. Ct. 1975) (governmental expenditures to influence referendum election enjoined).

Historically, this Court has always viewed the First Amendment as a barrier *against* governmental interference, not a grant of protection *to* government. *See Columbia*

Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring). Commentators have expressed a similar sentiment:

> The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents. T. Emerson, The System of Freedom of Expression 700 (1970) (footnote omitted).

Since the appellants have failed to demonstrate the existence of a municipal right of free speech, this appeal presents no substantial federal question.

B. The Appellants' Reliance on *Buckley* and *Bellotti* Is Misplaced.

Faced with a total absence of decisional support for their assertion of a municipal right of free speech, the appellants have attempted to fashion an underpinning for their contentions from the holdings in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978). The appellants' reliance is misplaced.

Any equation in *Buckley* of the right to speak with the right to spend money involved limitations on the expenditure of private funds, not the propriety of appropriating public funds. The court below, unlike appellants, properly noted the distinction:

> Another aspect of the question whether protected speech is implicated here at all concerns whether the appropriation of public funds involves protected speech. We know that the act of making political contributions and expenditures involves protected speech

> and not merely conduct. *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). *The means by which a donor acquires funds* which are given to finance political expression *is one step further removed from the expression itself* and was not considered in *Buckley* v. *Valeo.* Surely, the First Amendment does not justify the stealing of funds or of a printing press because the defendant was planning to use the funds or the printing press to publish his views on a subject of public concern. Governmental restraint, even prior restraint, plainly is appropriate in such a case . . . . (J.S. 16a n.15) (emphasis added).

The appellants' reliance on *Bellotti* is similarly misplaced. The appellants argue from *Bellotti* that "speech" is protected regardless of its source (J.S. 12-27). Yet the very quotation from *Bellotti* on which the appellants rely indicates that the various "sources" which equally deserve constitutional protection are all private, rather than governmental, sources:

> The . . . inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, *whether corporation, association, union, or individual. Bellotti, supra,* 435 U.S. at 777, quoted at J.S. 13 (emphasis added).

In fact, *Bellotti* invokes the First Amendment in traditional fashion, as a bulwark against governmental interference with a private right. It prohibited the state's enforcement of a criminal statute against a private corporation. In attempting to find support in *Bellotti* for their asserted "governmental right of free speech," the appellants twist the words of *Bellotti* in a manner that ignores the facts of that case and the intention of this Court.

The appellants also assert that the court below construed Mass. Gen. Laws Ann. ch. 55, a portion of which was invalidated in *Bellotti,* to ban the challenged expenditures (J.S. 7 n.4). In their eagerness to identify this case with *Bellotti,* appellants mistate the holding of the court below. In fact, the Supreme Judicial Court carefully noted that Mass. Gen. Laws Ann. ch. 55 does not even refer to municipalities or municipal expenditures (J.S. 9a). It viewed the governing law of this case to be the "home rule" provisions of the Massachusetts Constitution:

> The issue at the heart of the dispute concerning the city's authority to appropriate funds for the purpose of influencing the result on the referendum question is whether the city's purported home rule ordinance is inconsistent with any law enacted by the Legislature under the powers reserved to it under the Home Rule Amendment. (J.S. 7a).

The Supreme Judicial Court noted that ch. 55 is "comprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing. . . ." (J.S. 8a). Yet ch. 55 contains no reference to municipalities:

> We interpret G.L. c. 55 as intended to reach all political fund raising and expenditures within the Commonwealth. The absence of any reference to municipal corporations is significant . . . as an indication that the Legislature did not even contemplate such municipal action could occur. (J.S. 9a).

From this omission the court below concluded:

> A municipality has no authority to appropriate funds for the purpose of taking action to influence the result

> of a referendum proposed to be submitted to the people at a State election. We reach this conclusion on the basis of the existence of broad regulatory legislation concerning the collection and expenditure of funds for election purposes. (J.S. 6a).
>
> . . . we agree with the plaintiffs that the appropriation of funds by a municipality for the purpose of influencing the vote on a Statewide referendum question is "inconsistent with . . . laws enacted by the general court." (J.D. 7a-8a) *quoting* Mass. Const. Amend. Art. 2, §6.

Contrary to the appellants' assertion that the court below interpreted Mass. Gen. Laws Ann. ch. 55 as a "flat ban on speech" (J.S. 10), the Supreme Judicial Court held that it was the Home Rule Amendment which prohibited the expenditures of public funds. Mass. Gen. Laws Ann. ch. 55 at most was peripheral, its silence on municipal election spending illustrating Massachusetts' legislative judgment on the proper division of governmental powers between the state and its political subdivisions. The propriety of that judgment is a matter of state law and raises no substantial federal question. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 176 (1907).

C. The Appellants Cannot Invoke Federal Constitutional Claims Against The Commonwealth Of Massachusetts.

The Massachusetts Supreme Judicial Court held, as a matter of state law, that:

> A municipality has no authority to appropriate funds for the purpose of taking action to influence the result of a referendum proposal to be submitted to the people at a State election (J.S. 6a).

The appellants, a municipality and some of its elected officials, seek to compel Massachusetts to grant one of its political subdivisions, the City of Boston, the right to appropriate and spend public funds for that purpose.

This Court has long held that:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178-179 (1907).

Furthermore, this Court has consistently held that a municipality is powerless to invoke constitutional claims "in opposition to the will of its creator." *Williams* v. *Mayor & City Council of Baltimore,* 289 U.S. 36, 40 (1933); *City of Trenton* v. *New Jersey,* 262 U.S. 182, 192 (1923) (constitutional restraints do not apply against the State in favor of its own municipalities); *City of Newark* v. *New Jersey,* 262 U.S. 192, 196 (1923) (regulation of municipalities is a matter peculiarly within the domain of the State; city cannot invoke protection of fourteenth amendment against State); *City of Worcester* v. *Worcester Consolidated Street Ry.,* 196 U.S. 539, 549 (1905) (city is only a political subdivision of the State with powers which may be increased or repealed at the will of the legislature).

The appellants attempt to dismiss this time-honored constitutional doctrine in a footnote (J.S. 20-21 n.21). Yet none of the cases cited by the appellants diminish the vitality of *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907). None involve the assertion of alleged constitutional rights by a political subdivision against its creator, and all recognize, in one way or another, that cities are "subordinate arms of a state government" and ". . . derive their authority and power from their respective States." *E.g., National League of Cities* v. *Usery,* 426 U.S. 833, 855-6 n.20 (1976).

Since the City of Boston and its officials may not invoke a federal constitutional claim against the Commonwealth of Massachusetts, this case presents no substantial federal question. *City of Trenton* v. *New Jersey,* 262 U.S. 182 (1923); *City of Newark* v. *New Jersey,* 262 U.S. 192 (1923).

D. The Appellants' Reliance On The "Right To Hear" Cases Is Misplaced.

The appellants assert that:

> [E]ven if Appellants have no independent right to speak, the people of the City of Boston and the people of Massachusetts have a right to hear the views Appellants hold on referendum questions — and Appellants may properly assert that right before this Court. (J.S. 13 n.12).

The appellants rely on a recent line of cases beginning with *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). Those cases, all of which involve an audience demonstrably desirous of receiving the challenged communication, are inapposite. Lamont was a willing addressee clearly interested in receiving "communist political propaganda." *Id.* at 304. In *Procunier* v. *Martinez,* 416 U.S. 396 (1974), the rights protected were those of persons in:

> . . . direct personal correspondence [with] inmates and . . . hav[ing] a particular interest in communicating with them . . . . *Id.* at 408 (footnote omitted).

In *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972) the cited dictum indicates that

> The rights asserted here . . . are those of American academics who have invited Mandel to participate with them in colloquia, debates and discussions in the United States. *Id.* at 764.

In *Madison Joint School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), the speaker and hearers met face-to-face and their rights were "inextricably meshed." *Id.* at 175 n.7.

In the instant case, there is no such intimate, preexisting relationship between speaker and hearer. The neutral electorate has not demonstrated its eagerness to hear the City's message in any fashion. Absent such a demonstration, the appellants may not rely on the hearers' rights or even have standing to assert them. *Madison Joint School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 175 n.7 (1976). The "right to hear" cases have no application herein.

E. The Court Below Did Not Suppress Speech In Any Way.

The appellants contend that the court below imposed a "flat ban" on speech (J.S. 2); that it "silence[d] one voice in the political debate" (J.S. 2); that "municipal corporations and their elected officials . . . [were] silenced

by state laws" (J.S. 11); that the "voices . . . of Appellants [have] been stilled" (J.S. 14); that "the mayor['s] and certain other public official['s] freedom to speak is . . . uncertain" (J.S. 16); and that the "majority" has been silenced "in order to protect a supposed . . . minority." (J.S. 18 n.18). The appellants' rhetoric is as inaccurate as it is colorful.

The court below silenced no one. Its order was concerned solely with the expenditure of public funds:

> The order which was entered on July 19, 1978 . . . dealt with the expenditure of funds. Such an order is appropriate in an action brought under G.L. c. 40, §53, where a municipality is about to raise or expend money for purposes not authorized by law. That order enjoins the city from using any funds specifically appropriated to be used to influence the vote on the classification amendment (J.S. 22a) (citation omitted)
>
> . . . we decline to issue an injunction or to make any specific declaration concerning the lawful limits of [the] conduct [of municipal employees]. (J.S. 23a).

The Supreme Judicial Court was concerned with the propriety of a municipal expenditure under state statutes and the Massachusetts Constitution. No speech was suppressed and no federal constitutional issue is presented.

F. The Court Below Did Not Base Its Holding On The Federal Constitutional Rights Of Dissenting Taxpayers.

The appellants' claim that the "Supreme Judicial Court in fact upheld a federal right on the part of . . . dissenting taxpayers" (J.S. 32) is simply wrong. As noted above, pp. 2, 7-8, *supra,* the court below grounded its decision in state law. The Supreme Judicial Court vigorously rejected the appellants' claim that First Amendment rights were important to the resolution of this case:

> By its terms and in its traditional applications, the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination.
>
> . . . we suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision to disregard the mandate of the supreme legislative authority of the State. (J.S. 14a-15a).

It is true that in a portion of its opinion, the court below assumed *arguendo* the existence of a municipal right of free speech (J.S. 15a-21a). However, the conclusion the court below reached was:

> Even if we were to assume that the appropriation of funds by a municipal corporation to engage in robust, partisan speech is expression that the First Amendment was meant to protect, there are demonstrated, compelling interests of the Commonwealth which justify the "restraint" which the Commonwealth has placed on the city. (J.S. 16a-17a).

Certainly, the court below did not find "demonstrated, compelling interests *of the Commonwealth*" in the First Amendment rights of dissenting taxpayers. The source of the "demonstrated, compelling interests" is:

> The Commonwealth['s] . . . substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process. It may protect that interest by excluding its political subdivisions from partisan involvement in election questions . . . (J.S. 17a).
>
> The Commonwealth's strong interest in free and fair elections is expressed in the Constitution of the Commonwealth. (J.S. 17a).

After discussion of two Articles of the Massachusetts Constitution and related state statutes, the Supreme Judicial Court concluded:

> The Legislature may decide, as it has, that fairness in the election process is best achieved by a direction that political subdivisions of the State maintain a "hands off" policy. (J.S. 18a).
>
> . . . . Fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose. (J.S. 19a).

The Supreme Judicial Court was moved by considerations of electoral fairness arising out of state law and not by First Amendment considerations. Similar considerations of electoral fairness have impelled many state courts to forbid the expenditure of public funds to influence elections:

> . . . every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not implicitly authorized . . . or on the broader ground that such expenditures are never appropriate. *Stanson* v. *Mott*, 17 Cal.3d 206, 217, 551 P.2d 1, 8-9 (1976) (citations omitted).
>
> The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public . . . can only demean the democratic process. As a state agency supported by public funds they cannot advocate their favored position on any issue or for any candidate, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality. *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 452, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975).

Those considerations of fairness under state election laws do not raise any substantial federal question.[1]

III. Conclusion

The appellees submit that the appeal herein presents no substantial federal question and respectfully move this Honorable Court to dismiss the appeal.

Respectfully submitted,

HAROLD HESTNES
JOHN G. FABIANO
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
Tel: (617) 742-9100

Dated: November 15, 1978

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[1] The Supreme Judicial Court's only brief mention of the rights of dissenting taxpayers and of *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) is at the very end of its analysis (J.S. 20a-21a). The discussion there was not critical to its analysis or its holding and gives rise to no substantial federal question.